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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

NO. 466

EDWARD ROBERT GYURO
*PETITIONER*

*Vs.*

THE STATE OF CONNECTICUT
*RESPONDENT*

## PETITION FOR WRIT OF CERTIORARI

W. PAUL FLYNN, *Esq.*
132 Temple Street
New Haven, Connecticut, 06510
Kopkind & Flynn

With Whom on the Brief

Frank J. Raccio, *Esq.*
132 Temple Street
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

EDWARD ROBERT GYURO

*vs.*

THE STATE OF CONNECTICUT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut, announced May 7, 1968.

The opinion of the Supreme Court of the State of Connecticut is thus far unreported, and is reprinted in Petitioner's Appendix.

## STATEMENT OF JURISDICTION

The date of the announcement of the judgment sought to be reviewed is May 7, 1968. On July 30, 1968, the Hon. John M. Harlan ordered that the time for filing a petition for writ of certiorari be extended to September 4, 1968.

The jurisdiction of this Court is invoked under 28*United States Code, Section* 1257.

## QUESTIONS PRESENTED FOR REVIEW

1. DID THE SUPREME COURT OF THE STATE OF CONNECTICUT ERR IN DECIDING THAT THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DO NOT REQUIRE THE STATES TO INDICT, BY A GRAND JURY, DEFENDANTS CHARGED WITH INFAMOUS CRIMES?

2. DID THE SUPREME COURT OF THE STATE OF CONNECTICUT ERR IN DECIDING THAT THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED DESPITE THE FACT THAT THE RECORD DID NOT CONTAIN A WARRANT FOR THE ARREST OF THE PETITIONER?

## CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions involved are as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval force, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*U.S.C.A. Const. Amend. V*

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

*U.S.C.A. Const. Amend. XIV, Section* 1

". . . No person shall be held to answer for any crime punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the Militia when in actual service in time of war or public danger."

*Conn. Gen. Statutes Const. Art.* 1 *Sec.* 8, *p.* 344

## STATEMENT OF THE CASE

On July 15, 1965, upon the complaint of a prosecuting attorney for the Circuit Court of the State of Connecticut, the defendant was charged with the crime of attempted larceny. The complaint was not supported by "oath and affirmation" although the form of the complaint contains a provision therefor.* Thereafter, on October 25, 1965, the defendant pleaded not guilty to the charge, and the Circuit Court found "probable cause." The defendant was then bound over to the Superior Court where he was presented on an Information filed by the State's Attorney, on the charges of Breaking and Entering and Attempted Larceny. The defendant was not presented to or indicted by a Grand Jury.

In the Trial Court, the defendant moved to quash or dismiss the information on the ground that he was being required

*See Appendix Page 10a.

to answer for infamous crimes without presentment to or indictment by a grand jury in violation of the fifth and fourteenth amendments to the Constitution of the United States. The motion was denied, and the defendant was convicted by a jury on both charges. On appeal, before the Supreme Court of the State of Connecticut, the defendant assigned as error, the ruling of the trial court in denying his motion to quash or dismiss the information. The appellate court affirmed the ruling of the trial court on the motion.

In the Supreme Court of the State of Connecticut, the defendant raised, for the first time, the issue that he was not arrested by a warrant supported by oath and affirmation, that he did not waive his right to attack the arrest on appeal and that his warrantless arrest was apparent on the face of the record before the appellate court. The court determined that, despite the fact that the record failed to show how the defendant was arrested, the defendant was not illegally arrested.

## I. THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE WAS NOT PRESENTED TO OR INDICTED BY A GRAND JURY.

The Constitution of the State of Connecticut (*Article* 1, *Sec.* 8, *C.G.S.A. Constitution*) limits the right to an indictment by grand jury to crimes punishable by death or life imprisonment.[1] Because of this limitation, the Courts of that State have

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[1]Amendment 5, United States Constitution requires a Grand Jury Indictment in cases involving a capital or infamous crime. Both of the offenses with which Petitioner was charged are "infamous crimes". Drazen v. New Haven Taxicab Co. 95 Conn. 500.

customarily indicted defendants by the process of an Information brought by the various state's attorneys.

Thus, for example, the state's attorney may file an information in the Superior Court against one accused of a crime without a preliminary hearing before a magistrate or any other judicial officer or body. See *Conn. Gen. Statutes, Section* 54-42.* Indeed, it has been held in Connecticut that the investigation by the state's attorney and the determination by *him* that there is reasonable ground to proceed against the accused, takes the place of any preliminary hearing that may be required by "due process of law." *State v. Hayes*, 127 Conn. 543, 581.

Alternatively, a state's attorney may proceed under Section 54-43 *Conn. Gen. Statutes*,* and, upon his "representation" that he has reasonable ground to believe that a crime has been committed, the Superior Court, or a Judge thereof, is empowered to issue a warrant for the arrest of the person complained against. It was not until 1965 that Connecticut required a state's attorney applying for a bench warrant to submit facts, supported by oath or affirmation, from which a judge can determine that probable cause exists for the issuance of the warrant. See *State v. Licari*, 153 Conn. 127.

The case at bar affords a third example of the use of an Information in Connecticut. A circuit court prosecutor may file an information against an accused in the circuit court, and, under Section 54-1a Conn. Gen. Statutes, if the complaint is legally brought before the court, one of two procedures is followed:

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*Cf. Appendix Page 11a.

a. If the offense complained of is punishable by either a fine of more than $1,000 or imprisonment for more than one year, but not more than 5 years, the court may hold a hearing in "probable cause" or take jurisdiction itself of the crime, depending upon the recommendation of the prosecutor.

b. If the offense complained of is punishable by imprisonment for more than 5 years, the court shall conduct a hearing in probable cause.

Thus, under Connecticut law, an individual is anointed with the stigma of accusation by the finger of the prosecutor alone.

No less consideration should be given to an individual with respect to the manner in which he is accused of a crime than is given to the manner in which he is arrested or searched prior to indictment. This court was careful to point out in *Aguilar v. Texas*, 378 U.S. 108 (1964) that the sufficiency of an application for a search warrant must be made by a "neutral and detached magistrate" and not by one engaged in the "competitive enterprise of ferreting out crime." *Ibid*, p. 115. Accusation, similarly, should be removed from the sole province of the prosecuting attorney to one detached from the everyday battle against crime.

The purpose of the Fifth Amendment, in this regard, is to insure that an individual is charged with an offense by his fellow citizens, acting independently of either the prosecuting attorney or a judge. See *Stirone v. United States*, 361 U.S. 212.

There is no struggle with the constitutional mandate of the Fifth Amendment in the federal courts. The same protection, however, does not exist in the state courts, because it is said, the Fifth Amendment requirement of indictment by grand jury is not binding upon the States. See *Hurtado v. California*, 110 U.S. 516, 534.

The isolation of the "grand jury" clause of the Fifth Amendment defies reason, especially when most of the other protections contained in the Bill of Rights have been held applicable to the States via the Fourteenth Amendment.

All of the rights safeguarded by the First Amendment have been held by a series of decisions, to be applicable to the States.

*Fiske v. Kansas*
274 U.S. 380 (1927)

*Cantwell v. Connecticut*
310 U.S. 296 (1940)

*Near v. Minnesota*
283 U.S. 697 (1931)

*DeJonge v. Oregon*
299 U.S. 353 (1937)

The right to a trial by jury guaranteed defendants in criminal cases in federal courts by the Third Amendment is also guaranteed by the Fourteenth Amendment to defendants in State court trials.

*Duncan v. Louisiana*
391 U.S. 145
Decided May 20, 1968

The standard for obtaining a search warrant under the Fourth Amendment has been imposed upon the States under the Fourteenth Amendment.

*Aguilar v. Texas*
378 U.S. 108

Similarly, the Fifth Amendment's prohibition against compulsory self-incrimination has been held applicable to the States through the Fourteenth Amendment.

*Malloy v. Hogan*
378 U.S. 1

*Murphy v. Waterfront Comm. of N.Y. Harbor*
378 U.S. 52

The Sixth Amendment right of an accused to have compulsory process for obtaining witnesses in his favor is applicable to the States via the Fourteenth Amendment.

*Washington v. State of Texas*
388 U.S. 14

The right to a speedy trial is made applicable to the States by the Fourteenth Amendment.

*Klopfer v. State of North Carolina*
386 U.S. 213

The right of an accused under the Sixth Amendment to confront the witnesses against him is applicable to the States.

*Pointer v. Texas*
380 U.S. 400

The right of an accused to have counsel guaranteed by the Sixth Amendment, has been made enforceable upon the States through the Fourteenth Amendment.

*Gideon v. Wainwright*
372 U.S. 335

Ten Justices of this Court have supported the view that the Fourteenth Amendment prevents State invasion of rights enumerated in the first eight amendments. See *Gideon v. Wainwright*, 372 U.S. (*Opinion of Justice Douglas, at page* 345)

Absorption of the first ten amendments by the Fourteenth Amendment is more than a trend; it has become a judicial awareness of the fact that all of the protections guaranteed by the Bill of Rights are applicable to the States as well as the federal government.

The method of proceeding against an accused by information, as permitted by Connecticut, affords practically no protection at a critical stage of the criminal proceedings. Prosecutors, however honorable, are often motivated largely by the zeal of their duty to combat crime. Zeal, competition and the everyday battle against crime may lead, among other things, to a "stereotyped" attitude on the part of the prosecutor. He is called upon to judge whether an individual should be brought to trial in the first instance, a function which, we contend, he should not be empowered to perform. Judicial control has been the keynote of the great decisions of this court that have effectively removed arbitrary and unwarranted action from the power of the police. Thus, stringent requirements have been placed upon applications for search warrants and arrest war-

rants, the admissibility of confessions, etc. Yet, the power of the state prosecutor alone to accuse, despite the possibility of wrongful accusation, remains inviolate within the States and beyond the reach of the Fifth Amendment. An information accusing an individual with an infamous crime is usually the product of an investigation by police, an arrest and/or a search. The prosecutor weighs the information brought to his attention as a result of the investigation, arrest and/or search, and decides to prosecute the suspect. He claims to have reasonable cause by virtue of what the police have brought before him. The suspect, of course, has no way of testing the validity or sufficiency of the information that forms the foundation of the prosecutor's decision. It is only after he has been stained with the accusation that he can make such a challenge.

In commenting upon the incorporation into the Fourteenth Amendment of the Sixth Amendment right to a jury trial, this Court remarked:

"Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutors and against the compliant, biased or eccentric judge . . . Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."

*Duncan v. Louisiana*
391 U.S. 145

The same reasoning should apply to the Sixth Amendment

requirement of indictment by Grand Jury. If, as stated in *Duncan*, the framers of the constitution adopted the jury trial provision of the Sixth Amendment because of a "fear of unchecked power" it is reasonable to conclude that the Grand Jury proviso was adopted and made part of the same amendment for that reason.

Petitioner contends that the Grand Jury provision is made obligatory upon the states by the Fourteenth Amendment, and that the failure of the State of Connecticut to proceed against him by Grand Jury indictment was a violation of his constitutional rights.

## II. THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE WAS NOT ARRESTED BY A WARRANT SUPPORTED BY OATH AND AFFIRMATION.

The Connecticut Supreme Court noted that the record failed to disclose how the defendant was arrested. Nevertheless, petitioner's contention that his arrest violated constitutional provisions was rejected on the basis that: 1) the court concluded that the arrest was not illegal; and 2) the court held that the petitioner waived his right to attack the constitutionality of the "arrest."

It is our position that *O'Connor v. Ohio*, 385 U.S. 92 stands for the proposition that errors of Federal constitutional dimension are not waived because of a failure to meet state procedural requirements in the trial court.

The information was the only document in the record that could considerably form the basis for the arrest of the defendant. Because the information was not signed under oath, the arrest of the defendant violated his constitutional right to be arrested by a warrant, issued upon probable cause and supported by oath or affirmation.

*Giordnello v. United States*
357 U.S. 480

*Aguilar v. Texas*
378 U.S. 108

## CONCLUSION

For the reasons stated, it is respectfully submitted that the Court grant this Petition.

Respectfully submitted,

W. PAUL FLYNN
Counsel for Petitioner

## CERTIFICATION

This is to certify that five copies of the foregoing petition for certiorari were mailed to Richard Schatz, Esq., Assistant State's Attorney, Superior Court Building, Hartford, Connecticut, on August 31, 1968.

W. PAUL FLYNN
Counsel for Petitioner

SUPREME COURT

April Term, 1968

*State of Connecticut v. Edward R. Gyuro*

Information charging the defendant with the crimes of attempted larceny and of breaking and entering, brought to the Superior Court in Hartford County and tried to the jury before *Klau, J.*; verdict and judgment of guilty and appeal by the defendant. *No error.*

*W. Paul Flynn*, with whom, on the brief, were *Frank J. Raccio, Bernard P. Kopkind*, and *Charles L. Flynn*, for the appellant (defendant).

*Richard A. Schatz*, assistant state's attorney, with whom, on the brief, was *John D. LaBelle*, state's attorney, for the appellee (state).

*Alcorn, J.* The defendant was presented in the Superior Court on an information in two counts filed by the state's attorney. The first count accused the defendant of attempted larceny in violation of General Statutes §§54-198 and 53-63. The second count accused him of breaking and entering without permission in violation of General Statutes §53-75. Both of the offenses charged were infamous crimes. *Drazen v. New Haven Taxicab Co.*, 95 Conn. 500, 508, 111 A. 861. The defendant moved to quash or dismiss the information on the ground that he was being required to answer for infamous crimes without presentment to or indictment by a grand jury in violation of the fifth and fourteenth amendments to the con-

stitution of the United States. The court denied the motion, and the defendant, following a not guilty plea, was convicted by a jury on both counts. Motions to set aside the verdict and for a new trial were denied, and judgment was rendered on the verdict. The defendant has appealed from that judgment.

We first consider the defendant's claim that his rights under the constitution of the United States were violated because he was not presented for indictment before a grand jury. An identical claim was made in a recent habeas corpus proceeding in the Superior Court arising out of breaking and entering and larceny convictions; *Smith v. Warden*, 25 Conn. Sup. 309, 209 A.2d 521; in which the application for the writ was denied, and the United States Supreme Court, as recently as June 1, 1965, dismissed an appeal and denied certiorari. *Smith v. Warden*, 381 U.S. 411, 85 S. Ct. 1584, 14 L. Ed. 2d 698. The defendant nevertheless urges us to reexamine our decision in *Kennedy v. Walker*, 135 Conn. 262, 63 A.2d 589, aff'd, 337 U.S. 901, 69 S. Ct. 1046, 93 L. Ed. 1715, rehearing denied, 337 U.S. 934, 69 S. Ct. 1493, 93 L. Ed. 1740, which discusses the reasons why the federal constitutional requirement of a grand jury indictment does not apply in the case of infamous crimes such as the present ones. We find nothing in the more recent decisions of the United States Supreme Court which requires a change in the rule in that case. *Beck v. Washington*, 369 U.S. 541, 545, 82 S. Ct. 955, 8 L. Ed. 2d 98; *State v. Jones*, 153 Conn. 451, 457, 217 A.2d 691; see also *United States ex rel. Cooper v. Reincke*, 333 F.2d 608, 611 (2d Cir.) cert. denied, 379 U.S. 909, 85 S. Ct. 205, 13 L. Ed. 2d 181. Article first, §8, of the constitution of Connecticut requires an indictment by a grand jury only in the case of crimes punishable by death or life imprisonment, and for all other crimes the prosecution may be

initiated by complaint or information. General Statutes §54-46. The defendant was properly presented for trial on the information filed by the state's attorney. *State v. Stallings,* 154 Conn. 272, 278, 224 A.2d 718. The defendant's claim that he should have been charged only in an indictment by a grand jury is without merit, and the court properly denied the motion to quash or dismiss the information.

Another claim made by the defendant is that he was not arrested under authority of a warrant supported by oath or affirmation and that, in this respect also, his constitutional rights were violated. The constitutional right involved is not specified, but the brief indicates reliance on the rule of *State v. Licari,* 153 Conn. 127, 132, 214 A.2d 900. Incident to this claim are attacks on the court's failure "to find that the defendant was not arrested by a warrant supported by oath and affirmation, which fact is apparent on the face of the record" and also on the court's finding that the defendant has waived the claim of an illegal arrest which he now makes. The court found that no claim of an illegal arrest was made until after the trial or until this appeal was taken. These findings are unchallenged. There was no request made of the court to find that the defendant "was not arrested by a warrant supported by oath and affirmation." The record fails to disclose how the defendant was arrested. So far as appears he may have voluntarily surrendered. Nothing is laid before us except the fact that, in the Circuit Court, after the defendant had pleaded not guilty, that court found probable cause and ordered the defendant bound over to the Superior Court on a charge of attempted larceny made on the complaint of the prosecuting attorney of the Circuit Court, and, thereafter, that he was informed against, pleaded not guilty, and was tried and convicted

in the Superior Court on that charge and on the added charge of breaking and entering. *State v. Stallings*, supra. There is no merit to the claim of an illegal arrest which is now made for the first time and no indication that the defendant has been denied due process of law. *Reed v. Reincke*, 155 Conn. (29 Conn. L.J., No. 25, pp. 3, 5); *State v. Darwin*, 155 Conn. 124, 141, 230 A.2d 573.

The remaining assignments of error concern an asserted denial by the court of a motion to direct a verdict, the charge to the jury and a ruling on evidence. No basis is shown for making any correction in the finding.

The jury could have found the following facts: On the main floor of the Lord and Taylor store in West Hartford there was, at the time of the incidents involved in this case, what is called a fur vault, consisting of an enclosure approximately seventeen feet by eight feet in size, formed on one side by a masonry wall and on the other three sides by wooden stud partitions eight feet high. A wire mesh ceiling was nailed to the top of the wooden partitions below the ceiling of the room in which the vault was situated. The only means of entering the fur vault was through a door in one side. This door was kept locked, and the key was kept in an unlocked drawer of a desk two feet away from the door of the fur vault. Nearby, on the same floor of the store was an accessory stock room used for storage, but not for the storage of furs. On October 15, 1964, at about 5:15 p.m., a man, dressed in a uniform such as that used by porters and maintenance employees of the store, was seen at the door of the fur vault grasping the knob of the door. Porters and maintenance employees are not permitted to enter the fur vault or to handle furs. A half hour later the man was

seen still standing at the door. At 6:15 p.m. the defendant was seen bending over a box or carton in the accessory stock room. He was wearing clothes similar to the uniform worn by store maintenance men and claimed to be changing light bulbs in the room. He left the accessory stock room and ran down a stairway to a lower floor and out of the store, followed by the assistant manager of the store who lost sight of him in the parking lot outside. When the police arrived, the box in the accessory room was opened and was found to contain five mink coats. In the fur vault were five empty hangers. When furs are sold they are taken on the hanger to a packing station in another location, where they are wrapped. No furs were sold on October 15, 1964, and no personnel of the store was authorized to take furs into the accessory stock room. Each of the five mink coats had identifying numbers and a price tag affixed to it. The price tag indicated the retail price for which that coat would be sold by the store. The five coats were returned to the fur vault and later to the Lord and Taylor New York store. Four of the coats were thereafter sold for $995, $1095, $2000, and $2440 respectively. The fifth coat, priced at $1995, was not sold.

We have recited the foregoing facts from the claims of proof in the finding because of the peculiarities of this appeal. As previously related, one of the defendant's claims is that the court erred "[i]n denying defendant's Motion for a Directed Verdict." Actually the record does not disclose that any such motion was ever made or denied. On the other hand, the record does disclose that a motion to set aside the verdict was made on the ground that the verdict was contrary to law and against the evidence and that this motion was denied. The denial of this motion is not, however, assigned as error. The court's action on

either of these motions, if properly assigned as error, would, of course, be tested in the light of the evidence printed in the appendices to the briefs. *State v. Stallings,* 154 Conn. 272, 283, 224 A.2d 718; *State v. Vars,* 154 Conn. 255, 258, 224 A.2d 744; *State v. Mallette,* 153 Conn. 584, 585, 219 A.2d 447; *Lombardi v. J. A. Bergren Dairy Farms, Inc.,* 153 Conn. 19, 23, 213 A.2d 449. Both the defendant and the state appear to be unaware of the failure to make a proper issue of either motion and of the consequent defects in this phase of the appeal because both have briefed and argued the question whether "the state's evidence was sufficient to convict." No such question is assigned as error, however. Such an issue, if raised, would also be resolved on an examination of the evidence. *State v. Schindler,* 155 Conn. 297, 301, 231 A.2d 652. There is, therefore, no issue before us as to whether the evidence was sufficient to support the verdict on either count. We have decided, however, to consider the discussion of the issue by the parties so far as it bears on the attacks made on the charge of the court. The correctness of the charge, of course, is tested by the finding. *Lucier v. Meriden-Wallingford Sand & Stone Co.,* 153 Conn. 422, 424, 216 A.2d 818.

The error assigned in a portion of the charge relating to the first count is limited to an issue which is also embraced in the assignment of error concerning a ruling on evidence. In proving the value of the mink coats which were the subject of the attempted larceny, an essential element under the first count, the state did not produce the coats. Instead, it offered, through a custodian of the business records of the store, testimony and records concerning the retail price of the coats as established by Lord and Taylor and testimony as to the price for which four of the coats had later actually been sold. The defendant

objected on the ground that the value of the coats could not be proved without producing the coats in court. The court overruled the objection and admitted this evidence. The ruling was correct. The value of the coats was their market value, that is, the price at which they would probably have been sold in the regular course of business at the time when and the place where the attempted theft occurred, and any evidence bearing on that qustion could properly be considered. *People v. Irrizari,* 5 N.Y.2d 142, 146, 156, N.E.2d 69. Subsequently, the court charged the jury adequately as to the necessary proof of market value and that it was not necessary for the state to introduce the articles themselves in evidence. There was no error in this portion of the charge.

Error is also assigned in a portion of the charge concerning the second count of breaking and entering. Section 53-75 of the General Statutes under which the defendant was charged in the second count of the information makes it a crime to break and enter "any building . . . in the possession of another used as a place for the custody of property . . . without the permission, express or implied, of the person or persons legally in possession thereof." From the finding it is clear that no effort was made to establish the manner in which defendant gained entry to the store. Instead, the state sought to prove a violation of the statute by proof of a breaking and entering of the fur vault, which was located inside the store.

In the portion of the charge on the second count which is assigned as error the court charged the jury, so far as now material, as follows: "Now, the evidence indicated that the Lord & Taylor building or the store was a large building, a single building. Now, if there was a breaking and entering of

a door, of an enclosed room within that building, then, there would be a breaking and entering into the building, even though the person so breaking and entering into the room or enclosure which was closed by a door which was shut, even though the person who did enter into such room had come into the store lawfully, because a storekeeper or an owner of a store invites the public to enter into the store so when a person enters into the store, he enters with the permission of the owner but if that person goes into an area which is closed by a door and set off to which he has not been invited to enter and he breaks and enters into that place through the door, he would be violating this statute of breaking and entering into a building, provided the other elements exist, the necessary elements of this statute. Now, the State claims that this fur area was an enclosure with a door and a key to it, and it was shut off from the rest of the store."

At the conclusion of the charge counsel for the defendant excepted to the quoted portion on the ground that the court had charged that the fur vault was a building within the meaning of §53-75 as a matter of law, whereas the question should have been left to the jury as a question of fact. The specific objection was as follows: "Now, I want to object to part of the charge where your Honor talked about breaking and entering into a room which is some enclosure and is guilty of breaking and entering. I think that should be left to the jury. I think your Honor said that the building is an enclosed area with a door and the fur vault was such a place. Now, your Honor has taken away from the jury the question of whether or not this was a building. You found as a matter of law that it was a building, and I object on the grounds that this is an essential element of the crime that was found, so I object to that, your Honor please. The other thing was that your Honor said that the State has to

prove and has the burden of proving a breaking and entering in the fur vault, and it is our contention that breaking and entering into a fur vault is not a breach of the law. It is a fact for the jury. . . . Your Honor made an opening statement that the State has to prove a breaking and entering into the vault before you can find the defendant guilty. . . . Your Honor has said by making that statement or you are precluding the fact that the jury must find whether or not this fur vault was a building within the meaning of the law, and that is the reason, I think that is all I have."

There was no request to charge on the subject, but the exception distinctly stated the matter objected to and the ground of the objection as required by the rule. Practice Book §249; *Bevins v. Brewer,* 146 Conn. 10, 13, 147 A.2d 189.

No exception was taken to the charge on the ground that the rule stated by the court was erroneous. Consequently, the attack which is made on this portion of the charge does not require us to consider or pass upon the accuracy of the court's instruction that breaking and entering the fur vault would amount to breaking and entering a building within the meaning of General Statutes §53-75. The only issue presented is whether the court should properly have undertaken to determine that proposition as a matter of law or should have submitted it to the jury for determination as a question of fact. The court was correct in treating the subject as a matter of law. *Pascale v. Board of Zoning Appeals,* 150 Conn. 113, 116, 186 A.2d 377; *Park Regional Corporation v. Town Plan & Zoning Commission,* 144 Conn. 677, 684, 136 A.2d 785. Consequently, the error assigned in this portion of the charge must fail.

There is no error.

In this opinion the other judges concurred.

27264

STATE OF CONNECTICUT
CIRCUIT COURT

No. CR 16- 3257

Disposition date Dec. 3, 1965

| | | | | |
|---|---|---|---|---|
| TITLE | Edward Robert Grave | 16 | West Hartford | July 10, 1965 |

ALLEGATION: The undersigned, Assistant Prosecuting Attorney of the Circuit Court of the State of Connecticut, in said Circuit, on his oath of office complains, deposes, and alleges that he has reason to believe and does believe that

Edward Robert Grave

FIRST COUNT: Attempt to commit a statutory crime (larceny (value $10,000)

West Hartford — 53-122 (53-67(b) (Value $2,625.00)

SECOND COUNT:

THIRD COUNT:

☐ See reverse side for additional counts

DATE & SIGNATURE: July 15, 1965 — Thomas J. Gallagher

JURAT (For warrant only): Subscribed and sworn to before me this day of 19

PRmm 9 7-15-65

Sept 7 Oct 4 Oct 25

Sept 20, Oct 11, Nov 26, Dec 3

☐ SURETY ☐ CASH $ 2500

☐ SPOUSE JUSTIFIED ☐ YES

| COUNT | DATE OF PLEA | PLEA | VERDICT OR FINDING | FINE | DAYS IN JAIL | DISPOSITION IN ADDITION TO OR OTHER THAN JAIL OR FINE |
|---|---|---|---|---|---|---|
| FIRST COUNT | 10-25-65 | NG | | | | Probable Cause found Bound over to Sup. Court. |
| SECOND COUNT | | | | | | |
| THIRD COUNT | | | | | | |

Clerk

☐ Bond in amount of $ called and forfeited 19 , at A.M./P.M. ☐ WARRANT AND ARREST ORDERED

Probable cause finding Nov 19, 1965

§54-42. Original information in superior court

An original information may be filed in the superior court against any person accused of crime in any case in which an inferior court may, at its discretion, punish him or bind him over for trial, and in any other case upon the order of the superior court. (1949 Rev., §8764.)

§54-43. Bench warrant

Upon the representation of any state's attorney that he has heasonable ground to believe that a crime has been committed within his jurisdiction, the superior court or, when said court is not in session, any judge thereof, may issue a bench warrant for the arrest of the person or persons complained against, and in such case shall, except in cases punishable by death or life imprisonment, fix a bond for the appearance of such person or persons in such amount as to said court or to such judge appears reasonable. When any person is arrested on a bench warrant issued by order of the superior court or, when said court is not in session, by a judge thereof, the officer or indifferent person making such arrest shall forthwith bring such person before the clerk or assistant clerk of the superior court for the county where such warrant was issued, which clerk or assistant clerk shall thereupon advise such person that he has a right to retain counsel, that he has a right to refuse to make any statement, and that any statement he makes may be introduced in evidence against him, and shall order such person to enter into a recognizance with surety to the state in such sum as said court or such judge has fixed conditioned that such accused person shall appear before the superior court having criminal jurisdiction then

in session or next to be held in and for the county where such bond is required, to answer to the bench warrant and information filed in such case; and on his failure to enter into such recognizance or if the offense charged in such bench warrant and information is not bailable, such clerk or assistant clerk shall issue a mittimus committing such person to jail until he is discharged by due course of law. (1963, P.A. 126, §2.)